No. 13392

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

WESTSIDE FORD, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM ORDER ENFORCING ADMINISTRATIVE SUBPENA

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR APPELLEE

J. CHARLES DENNIS
U. S. District Attorney

JOHN H. BINNS
Special Assistant U. S. Attorney
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1023 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON — 11/18/52 — 45 COPIES

No. 13392

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

WESTSIDE FORD, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM ORDER ENFORCING ADMINISTRATIVE SUBPENA

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR APPELLEE

J. CHARLES DENNIS
U. S. District Attorney

JOHN H. BINNS
Special Assistant U. S. Attorney
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1023 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON — 11/18/52 — 45 COPIES

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

UNITED STATES CONSTITUTION

RULE OF COURT

FEDERAL STATUTES AND REGULATIONS

No. 13392

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTSIDE FORD, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM ORDER ENFORCING ADMINISTRATIVE SUBPENA

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR APPELLEE

I. STATEMENT OF THE CASE

On March 10, 1952 John H. Binns, District Enforcement Director of the Office of Price Stabilization, Seattle District, acting under delegation of authirity from the President of the United States, instituted an investigation of Appellant and defined its

scope and purpose, using O.P.S. Form 228, duly completed and signed, for this purpose (Tr. 28-33). It should be noted that at Tr. 29 this date is incorrectly stated as March 3, 1952. The correct date is found at Tr. 32 near the bottom of the page. See also Tr. 51-52. The investigation dealt solely with sales of new automobiles.

A partial examination of Appellant's records relating to new automobiles was made by O.P.S. investigators between March 11 and March 25, 1952 (Tr. 9, 12).

It became apparent that a detailed sales audit was necessary to determine overcharges (Tr. 9). The records of the company relating to the sales of new automobiles and services performed thereon are voluminous, involving as many as eleven different documents in connection with each new car sale (Tr. 15-20). Approximately 365 new automobiles were sold during the period subject to investigation. About 1200 files must be examined in order to sort out the proper 365. An audit of the period therefore involves examination of 1200 sales, segregation of 365 sales and detailed examination of as many as 4000 separate documents.

In an atempt to shorten the investigative process, Harold F. Nelson, one of the O.P.S. Enforcement

Attorneys, suggested that the records be microfilmed. Appellant referred the matter to its attorneys who not only refused to permit microfilming but also refused all further inspection (Tr. 8).

Thereupon on March 26, 1952 the District Enforcement Director issued a Subpena Duces Tecum commanding the President of Appellant to appear at the O.P.S. office at 10:00 a. m., on March 31, 1952, and give testimony and bring with him the documents relating to all sales of new automobiles and service thereon from December 19, 1950 to March 25, 1952 (Tr. 5-8). The Subpena was not obeyed (Tr. 8-9).

Appellee thereupon on April 3, 1952 moved the District Court for an Order to enforce compliance with the Subpena (Tr. 3-5). On April 16, 1952, after hearing on affidavits, and extended oral argument, the District Court by Judge John C. Bowen entered an Order Enforcing Administrative Subpena requiring the production of the desired records and permitting Appellee to inspect and copy or photograph the same (Tr. 35-37).

The Order grants less than the requested relief and falls short of the demand of the Subpena in that it does not specifically mention testimony, and it provides for production of the records at Appellant's place of business rather than at the O.P.S. office. It

also limits the time to the business hours of certain days (Tr. 36-37).

These modifications were made either at the request of Appellant's attorneys or with their full approval (Tr. 88-91). Appellee has not cross-appealed.

II. SUMMARY OF ARGUMENT

It is the position of Appellee that everything done by the Office of Price Stabilization in this case is well within the discretion granted to the District Enforcement Director, and that the Court's Order is well within the Court's jurisdiction and authority.

A. The scope of the Director's authority is broad. The investigation is a legal one if the data sought concern a matter within the jurisdiction of the agency.

B. All records kept pursuant to O.P.S. regulations or orders are within the jurisdiction of O. P. S.

C. It is the prerogative of the District Enforcement Director to determine the extent and relevancy of the data to be inspected. His determination will not be set aside unless it is arbitrary or unsupported in fact or law.

D. The Court should not inquire into the question of relevancy or reasonableness unless it appears that

the Director's determination is arbitrary, and the mere fact that the Director issued the Subpena is sufficient to show that he deemed the information necessary or proper to aid in the administration and enforcement of the Act, and that he has not acted arbitrarily or undertaken to pursue an unnecessary investigation.

E. The manner of conducting the investigation is within the discretion of the District Enforcement Director. Standards of materiality and relevancy are less rigid than in a trial or adversary proceeding.

F. The purpose and scope of the investigation were legally and adequately defined on March 10, 1952.

G. In a matter involving an administrative Subpena Duces Tecum there is nothing in the Statute or elsewhere providing for advice to or service upon the Appellant of anything defining the scope or purpose of the investigation.

H. There is nothing in the Statute or elsewhere providing for service of an Inspection Authorization prior to the service of a Subpena.

I. All documents mentioned in the Subpena are material and relevant to this investigation. The Sub-

pena clearly and adequately defines and describes the records sought.

J. The Order of the District Court did not in any respect exceed the scope of the pleadings, prayer, and record. On the contrary, it restricted them and granted Appellant partial relief to which it was not strictly entitled.

K. The provision for photographing the records in no sense prejudices the Appellant, since photographing is a form of copying and copying is a necessary incident in the inspection of voluminous records.

L. There was no harassment of Appellant.

M. No constitutional right of Appellant has been violated.

N. Since everything done by the Agency was in order and the trial court acted within the limits of its authority, the cumulative effect cannot be erroneous.

III. ARGUMENT

A. AUTHORITY OF DISTRICT ENFORCEMENT DIRECTOR.

In the matters of investigation a very broad authority has been delegated to the District Enforcement Director. Executive Order 10161, September 9, 1950 (15 F.R. 6105), as amended; Economic Stabilization Agency General Order No. 2, January 24, 1951 (16 F.R. 738); Delegation of Authority 4, Supplement 1, (16 F.R. 3595) Revised (16 F.R. 4359).

It is sufficient if the data sought concern a matter within the jurisdiction of the Agency.

In *Perkins v. Endicott Johnson Corp.*, 128 F. (2d) 208, certiorari denied 317 U.S. 607, 87 L. Ed. 492, the Circuit Court of Appeals for the Second Circuit said:

> "If an administrative investigation 'be duly authorized, it is no more subject to obstruction than judicial proceedings'."

The inner quotation is from *McCann v. S.E.C.* 87 F. (2d) 377, 379, 109 A.L.R. 1445.

In *Hagen v. Porter*, 156 F. (2d) 362, decided by the Ninth Circuit Court in 1946, certiorari denied 329 U.S. 729, 91 L. Ed. 631, this Court held that showing probable cause is not a prerequisite to en-

forcement of an administrative Subpena under the Emergency Price Control Act of 1942. It further held that in an ex parte inquiry to determine existence of violations of the Statute, wherein production of documents by Subpena Duces Tecum is sought, standards of materiality or relevancy are less rigid than those applied in a trial or adversary proceeding. This holding bears a striking analogy to the modern rules of Court which provide that in discovery proceedings inquiry may be made as to anything which may lead to evidence. The Court further held that it will take judicial notice of the contents of the regulations and that the presumption of regularity of the acts of administrative officers will prevail in the absence of convincing affirmative evidence to the contrary.

B. RECORDS WITHIN O.P.S. JURISDICTION.

All records kept pursuant to O.P.S. regulations or orders are within the jurisdiction of O.P.S. *Perkins v. Endicott Johnson Corp.*, supra; *Dossett v. Porter*, 161 F. (2d) 839.

The regulation governing this investigation is Ceiling Price Regulation 83. Section 13 of that Regulation provides as follows:

> Sec. 13. Records.
>
> "(a) The provisions of the General Ceiling Price Regulation are hereby continued in effect insofar

as they apply to the preparation and preservation of such 'current records' as you were required to make covering sales between January 26, 1951, and the effective date of this regulation.

(b) You shall preserve for two years the invoices required to be retained in section 10 of this regulation and all other records showing your prices and charges for sales of commodities subject to this regulation."

Section 10 of C.P.R. 83 defining the invoices required to be retained reads as follows:

Sec 10. Invoices.

"Whenever you make any sale (whether at wholesale or retail), on and after December 10, 1951, you shall prepare an invoice in duplicate, one copy of which shall be given to the purchaser within 7 days and the other copy you shall retain in your records.

This invoice shall set forth the following information unless any item of the following is contained in any other document delivered to the purchaser within 7 days from the date of the sale:

(a) Date of sale.

(b) Make of automobile, model, year and body style, motor number and serial number.

(c) Basic price, transportation charge, preparation and conditioning, Federal excise tax, charge for extra, special, or optional equipment.

(d) State and local taxes.

(e) Charge for other services or items of equipment requested (undercoating, glazing, etc.).

(f) Finance charges, name of finance company, method of payment and amount of cash received.

(g) If a used car is traded in as part payment for the new automobile, the invoice must show the following information with respect to the car traded in:

(1) Make of automobile traded in, model and body style and optional equipment thereon.

(2) Allowance made on the trade in.

(3) Motor number and serial number."

It should be noted that the quotations above are from the original issue of C.P.R. 83 (16 F.R. 10594) issued October 15, 1951, as amended November 5, 1951 (16 F.R. 11504), which was in effect at all times pertinent to this case. Revision 1, issued August 18, 1952 (17 F.R. 7572) made some changes in section numbering and important changes in the substance. A comparison of either the Subpena or the District Court's Order with the requirements of the Regulation is all that is necessary to establish O.P.S. jurisdiction as to the records sought.

Section 16 of the General Ceiling Price Regulation (16 F.R. 808) so far as the same is pertinent to this case, requires the keeping of records as follows:

"(b) Current records. If you sell commodities or services covered by this regulation you must

prepare and keep available for examination by the Director of Price Stabilization for a period of two years, records of the kind which you customarily keep showing the prices which you charge for the commodities or services. In addition, you must prepare and preserve records indicating clearly the basis upon which you have determined the ceiling price for any commodities or services not delivered by you or offered for delivery during the base period. If you are a retailer you are required to preserve your purchase invoices and to record thereon both your initial selling price and the section of this regulation under which you have determined your ceiling price."

Appellant's invocation (Brief, 27) of the Capehart Amendment, 50 App. USCA 2102 (d) (4), is completely beside the point, as clearly appears from the text, which reads:

"(4) After the enactment of this paragraph no ceiling price on any material (other than an agricultural commodity) or on any service shall become effective which is below the lower of (A) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price, or (B) the price prevailing during the period January 25, 1951, to February 24, 1951, inclusive. Nothing in this paragraph shall prohibit the establishment or maintenance of a ceiling price with respect to any material (other than an agricultural commodity) or service which (1) is based upon the highest price between January 1, 1950, and June 24, 1950, inclusive, if such ceiling price reflects adjustments for increases or decreases in costs occurring sub-

> sequent to the date on which such highest price was received and prior to July 26, 1951, or (2) is established under a regulation issued prior to the enactment of this paragraph. Upon application and a proper showing of his prices and costs by any person subject to a ceiling price, the President shall adjust any such ceiling price in the manner prescribed in clause (1) of the preceding sentence. For the purposes of this paragraph the term 'costs' includes material, indirect and direct labor, factory, selling, advertising, office, and all other production, distribution, transportation and administration costs, except such as the President may determine to be unreasonable and excessive."

It is apparent that, under this provision, many ceiling prices existing at the time of its passage can be justified and will remain in force, and that in no case is an adjustment automatic. There must be an application and a proper showing. Unreasonable and excessive costs may be excluded and disregarded. Moreover, there is no provision for a retroactive adjustment.

Appellant has not stated or suggested that it has applied for an adjustment.

It is therefore apparent that the costs of labor and materials in question are pertinent. Under the Regulations, phantom services may not be made the basis of a charge, so it is proper in every case to match the cost against the charge in order to determine whether service was, in fact, rendered, and, if

so, what service. Until an application for adjustment is made and granted, the standard set by the Regulation is conclusive.

C. DETERMINATION OF EXTENT AND RELEVANCY OF INSPECTION.

It is the prerogative of the District Enforcement Director to determine the extent and relevancy of the data to be inspected. His determination will not be set aside unless arbitrary or unsupported in fact or law. *Benenson Realty Corp. v. Porter*, 158 F. (2d) 163 (Em. C.A.).

As this Circuit Court of Appeals said in *Bowles v. Abendroth*, 151 F. (2d) 407 at page 408:

> "We think the courts may not substitute their judgment of the necessity or desirability of an investigation for that of the agency made responsible by Congress for the policing of wartime prices."

The Eighth Circuit Court of Appeals said in *Creedon v. Warner Holding Co.*, 162 F. (2d) 115, at pages 119-120:

> "It requires the presence of unusual and prejudicial circumstances to show that a request of the Administrator to inspect relevant and material books and papers is unreasonable."

In this case the discretion of the Director is supported by the order of a careful, conscientious and ex-

perienced District Judge who, out of excess of caution, whittled down the Subpena somewhat, but ordered compliance with its essential part. This should be all but conclusive.

D. PROPER EXTENT OF COURT'S INQUIRY AS TO RELEVANCY AND REASONABLENESS.

The Court should not inquire into the question of relevancy or reasonableness unless it affirmatively appears that the Director's determination is arbitrary. The mere fact that the Director has issued the Subpena is sufficient to show that he deemed the information necessary or proper to aid in the administration and enforcement of the Act, and that he has not acted arbitrarily or undertaken to pursue an unnecessary investigation.

In *Bowles v. Northwest Poultry and Dairy Products*, 153 F. (2d) 32 at page 34, this Court said:

> "Because of the well established presumption of regularity attending acts of administrative agencies, the mere fact that the Administrator issued an inspection requirement is sufficient to show that he deemed the information sought here necessary or proper to aid in the administration and enforcement of the Act and that he has not acted oppressively or undertaken to pursue investigations where no need therefor is apparent."

That case is in many ways analogous to the instant case. The Administrator sought:

> "To inspect and copy all (the company's) purchase and sale records and disbursement records covering appellee's sale and purchase of all turkeys from May 8, 1944, to and including August 10, 1944, including the records showing whether or not the corporation had complied with the prices for processing turkeys under Regional Order G. 93." (page 33.).

The District Court had refused to order enforcement of an Inspection Request in the terms quoted. This Court reversed the District Court, and clearly laid down the proper judicial policy in the following words—

> "Unless the federal courts approach the judicial problems of enforcement of the Act with a clear vision of what are the destructive evils of price inflation, and with the intent not to weaken the Administrator's hand in the legal exercise of the powers Congress has given him the beneficent purpose of the legislation will be frustrated." (page 34).

In *Perkins v. Endicott Johnson Corp.*, supra, the Court said:

> "The administrative officer may properly consider evidence which would be incompetent in a judicial trial and which a court in a preview hearing would disregard." (page 223).

E. MANNER OF CONDUCTING INVESTIGATION.

The manner of conducting the investigation is within the discretion of the District Enforcement Director. In *Bowles v. Baer*, 142 F. (2d) 787, Judge Minton, now of the Supreme Court, speaking for the Circuit Court in a case involving an O.P.A. Subpena Duces Tecum said, at page 789:

> "The Administrator was given authority to subpoena witnesses before him for investigation. If they refused to appear and testify or to bring the requested documents, the Administrator was authorized to apply to the District Court for an order requiring them to comply with his subpoenas. On such application, the District Court has to determine only whether the Administrator was conducting an investigation, whether he had subpoenaed the witnesses named in the complaint to appear and bring the papers and documents properly identified in the subpoenas, and whether the witnesses had refused to comply.'

Standards of materiality and relevancy are less rigid than in a trial or adversary proceeding. *Hagen v. Porter*, supra.

F. PURPOSE AND SCOPE LEGALLY DEFINED.

Purpose and scope of the investigation were legally and adequately defined on March 10, 1952 (Tr. 31-33). The District Enforcement Director has been

delegated as competent authority to define the scope and purpose of an investigation inspection or inquiry within his District. See citations in paragraph III. A above. There is nothing in the law which requires that the definition of scope and purpose be in writing or that it be in a specific form or that the subject be advised of the scope and purpose of the investigation, inspection or inquiry. Form 228 was created for administrative reasons in the Office of Enforcement in order that there might be a document in the record to show what had been determined. The subject of the investigation is the Appellant. S.R. 5 of the General Ceiling Price Regulation deals with retail prices for new and used automobiles; paragraph 5 thereof deals with ceiling prices of new automobiles. C.P.R. 83 deals with retail and wholesale sales of new passenger automobiles. The Appellant was subject to such regulations and undoubtedly cognizant thereof. As appears from the Form 228, the purpose of the investigation was to determine whether Appellant was complying with the Defense Production Act and the regulations mentioned. Its scope included examining, copying, and making notes of the books of account, statements, records, schedules, sales slips, papers documents and any and all other writings of every kind, nature and description required to be kept by the person named therein by the Defense

Production Act of 1950 and Regulations or Orders issued thereunder. It is difficult to imagine what more could have been put into the document unless the results of the investigation had been known in advance.

Appellant, at page 16 of its Brief poses a question:

> "The question may be raised how Appellee can possibly determine what documents are vital to the scope of his investigation, purpose having been determined, if it is not familiar with the business, records, and files of the parties investigated."

Appellant's solution is to postpone definition of the scope of the investigation until *after the* records have been given at least a preliminary examination.

To demonstrate the fallacy of this proposition it need only be stated clearly. The statute, 50 App. U.S.C.A. 2155 (a), Section 705(a) of the Defense Production Act, 1950, clearly requires definition of both purpose and scope before *any part* of the investigation is undertaken. It is obvious that such definition must, in the nature of things, be general. Otherwise, there could be no investigation if the subject refused all information. Moreover, there is no authority for requesting even preliminary information until purpose and scope have been defined.

G. DEFINITION OF SCOPE AND PURPOSE NEED NOT BE SERVED UPON SUBJECT OF INVESTIGATION.

In a matter involving an administrative Subpena there is nothing in the Statute or elsewhere providing for advice to or service upon the Appellant of anything defining the scope or purpose of the investigation. Appellant on page 17 of its Brief baldly asserts, and throughout its argument assumes, that the purpose of the Form 228 is to advise the party subpenaed "so that he may know the scope and purpose of the investigation and hence the testimony and documents required in response thereto." No authority is cited for this position and none can be found. The Subpena itself tells him what is wanted. The quotation of EP-1 in Appellant's Brief, 17, has nothing to do with a Subpena Duces Tecum. It refers to Inspection Authorizations which, while in some degree analogous to Subpenas Duces Tecum, differ from them in important particulars. It is interesting to note that EP-1 defining and providing for Inspection Authorizations, and EP-2 defining and providing for Subpenas, were issued on the same day. They appear on the same page of the Federal Register (16 F.R. 2496), they are effective as of the same date, yet neither refers to the other.

The quotations from EP-1 and EP-2 appearing at page 11 of Appellant's Brief make it plain that an Inspection Authorization is required to contain information as to scope and purpose, whereas in case of a Subpena Duces Tecum it is only necessary that the District Enforcement Director has in fact defined it. EP-2 does not conflict with the Statute; EP-1 goes beyond statutory requirements.

H. INSPECTION AUTHORIZATION NEED NOT PRECEDE SUBPENA.

There is nothing in the Statute or elsewhere providing for service of an Inspection Authorization prior to the service of a Subpena. Appellant's counsel at pages 8-10 of their Brief make an ingenious argument for the proposition that an Inspection Authorization must be served before a Subpena. This is sheer wishful thinking, unsupported by authority. The case of *Bowles v. Sachnoff* (D.C.W.D. Pa. 1946) 65 F. Supp. 538, quoted at page 9 of Appellant's Brief, does not support the construction placed upon it. In that case, the only request made by O.P.A. was oral. The Court merely held that it would not enforce an oral request. The last sentence quoted makes it clear that the Court used the term "Subpena Duces Tecum" in a sense broad enough to include both the Subpena proper and the Inspection Request,

the latter being the O.P.A. document corresponding to the Inspection Authorization of O.P.S.

In this connection it should be noted that while there are many similarities between the Inspection Authorization and the Subpena, there are also many differences. The Inspection Authorization is intended to be used only at the place where the books and records are customarily kept, or his business is conducted. Its scope is limited to an inspection of physical, tangible books, records, writings, premises and property. The Subpena adds a new element "testify under oath.' It retains the language as to "books, records, and writings" but omits all reference to inspection of premises and property. It is apparent that the two have only one element in common — the inspection or production of books, papers, and records. As to this element, the Inspection Authorization is limited to one place, the Subpena is not so limited. Under the Inspection Authorization the Government cannot require testimony. Under the Subpena it cannot inspect premises or property.

If then the Government wants testimony under oath it must use the Subpena. The Inspection Authorization is completely ineffectual for this purpose. Such testimony, together with the production of records upon which the witness was to be inter-

rogated, is exactly what the Government asked in this case. If an Inspection Authorization had been served and complied with, the testimony would still be lacking. Upon Appellant's theory the Government would then have to serve the Subpena in order to get what it wanted in the first place.

In the instant case there was a refusal to comply with a request for information. See affidavit of Harold F. Nelson (Tr. 8), which states "that R. W. Graham of the said law firm, acting on behalf of Westside Ford Company, refused to permit the request and in fact refused any inspection of the records whatsoever."

In view of this evidence and this proceeding, it is a little startling to read at page 10 of Appellant's Brief that there is no indication that Appellant would have declined reasonable inspection under an appropriate authorization." One wonders why we are here, particularly since the District Court, incorrectly we think, whittled the relief granted to almost exactly the dimensions which Appellant suggests.

I. ALL DOCUMENTS DEMANDED ARE MATERIAL AND RELEVANT.

All documents mentioned in the Subpena are material and relevant to this investigation. The Subpena clearly and adequately defines the records sought as follows: (Tr. 6) "records and invoices relative to all sales of new automobiles sold from December 19, 1950 to present date, including records of service performed on said automobiles." A comparison of this language with Sections 10 and 13 of C.P.R. 83, Section 16(b) of the General Ceiling Price Regulation, effective until March 2, 1951, and Section 3 of S.R. 5, effective from that date to October 15, 1951, makes it entirely clear that everything requested is entirely proper and relevant to this investigation.

Appellant, at pages 24 and 25 of its Brief, argues that information regarding the cost of preparation and delivery of new cars, and new car repair orders, are irrelevant. It is plain from Paragraph 3, S.R. 5 to G.C.P.R., partially summarized by Appellant at pages 23 and 24 of its Brief, that the dealer's ceiling price under the G.C.P.R. for preparing and conditioning a new automobile for delivery is one of the elements going to make up the ceiling price of the automobile. In other words, the ceiling price cannot be determined under S.R. 5 without this infor-

mation. Similarly, the dealer's ceiling price under G.C.P.R. for any other services performed is an element entering into the ceiling price. Section 2 of C.P.R. 83, imperfectly summarized at page 25 of Appellant's Brief, states that the preparation and conditioning charge, and G.C.P.R. ceiling price for other services "requested in writing by the customer, and customarily performed on new cars by the seller", enter into the ceiling price of the automobile under C.P.R. 83. It should also be noted that Section 7 of C.P.R. 83 as originally issued October 15, 1951, which was in effect until August 23, 1952, provides as follows:

> "Section 7(a). The charge for preparing and conditioning the new automobile for delivery shall be your charge for preparing and conditioning prevailing during the period January 26 to February 24, 1951, but not in excess of 5 percent of the basic price of the automobile, until a specific preparation and conditioning charge is established by the Director in a Special Order. The preparing and conditioning charge must be directly related to services actually rendered in preparing the new automobile for delivery. If no services are rendered you can make no charge for preparing and conditioning. The preparing and conditioning charge does not include advertising charges or any other charge which represents an item not directly a part of the preparation for delivery."

The provisions, "requested in writing by the customer," and "if no services are rendered, you can

make no charge" should be specifically noted. One of the things which the Office of Price Stabilization must look for in cases of this sort is what are known as "phantom services", that is, services charged for though not rendered. It is obvious that repair orders and records which indicate cost of labor and materials expended in the preparation and conditioning of new cars for delivery are the places where investigators must look for the covering up of such phantom charges. This the District Court recognized in the wording of its Order. These records are very definitely relevant to the subject and are specified as records required to be kept under C.P.R. 83, Section 10 (c) and (e). Section 16 of the G.C.P.R. requires keeping and preservation of records as to all commodities and services.

J. DISTRICT COURT ORDER DID NOT EXCEED PROPER SCOPE.

The Order of the District Court did not in any respect exceed the scope of the pleadings, prayer, and record. On the contrary, it restricted them and granted the Appellant partial relief to which it was not strictly entitled.

The Subpena clearly and adequately defined and described the records sought. There can be no doubt that Appellant knew exactly what was required. The

affidavit of its Business Manager William L. Bishop (Tr. 14-20) proves beyond a possible doubt that the Appellant knew exactly what was wanted. He obligingly furnishes the most precise specifications to indicate clearly that Appellant completely understood the requirements of the Subpena.

Appellant cannot properly complain that the Court's Order provides for on-premises inspection, since this provision was inserted by the Court for Appellee's benefit as a partial measure of relief pursuant to at least an implied request of Appellant. The affidavit of Bishop (Tr. 14-20) seeks to make out a case of hardship by asserting that the various records sought are not segregated in the files. Affidavits of Bishop (Tr. 24) and Graham (Tr. 26) insist that Appellant has never refused to permit inspection of the records at its place of business. Appellant even now asserts at page 10 of its Brief "there is no indication that Appellant would have declined reasonable inspection under an appropriate authorization." The Court did not believe these protests but they make it plain that in Appellant's opinion on-premises inspection is much less burdensome than taking the records to the O.P.S. office. Common sense says the same.

The Order was settled after a rather lengthy discussion in which Court and counsel for both parties

freely took part. The first reference to place of inspection occurs at Tr. 55. Mr. Frye, one of Appellee's attorneys, emphasizing the fact that what the Government most wanted was inspection of the documents, stated as a concession to Appellant "In fact the Government would be willing now, as it has been in the past, to stipulate for an Order that will allow the Government to go ahead and make an inspection of the records on the defendant's premises. However, the defendant is not willing now, nor has he been willing, to permit such inspection." There was no comment from Appellant's counsel. At Tr. 64 Appellant's counsel complains of the proposed removal of its records from its place of business as the cause of its feeling that "that had been enough." There was no other argument on the question of place.

The Court announced, apparently on its own Motion (Tr. 75) that production of the records would be required at the plant of the respondent corporation "and there will be no Order of the Court at this time for the production at the offices of the enforcement officer."

All of this was obviously for the benefit of the Appellant who is in no position to complain. Indeed its counsel made no complaint or protest when the Court announced that ruling. We think the Court

was technically wrong in changing the place but it is certainly not a mistake of which Appellant can complain. We need not discuss the interesting possibility that a cross appeal by the Government would have been in order.

The Order of the District Court requires the production of documents. That is one of the things expressly authorized by 50 App. U.S.C.A. 2155(a), which is quoted at pages 38 and 39 of Appellant's Brief. The Court could have required more, but did not. The statute does not attempt to limit or define the place where the documents are to be produced.

The case of *G. H. Love, Inc., v. Fleming*, 161 F. (2d) 726, decided by this 9th Circuit Court, which Appellant cites at pages 37 and 39 of its Brief, does not assist Appellant. That case was decided in favor of the United States. It properly upholds an O.P.A. Inspection Requirement. It also overrules the customary claim of violation of the Fourth Amendment to the Constitution of the United States.

Porter v. Clayton Packing Co. (D.C.E.D. N.Y., 1946) 65 F. Supp. 825, is on all fours with the instant case. The Subpena in that case called for production of voluminous records at a distance from the company's plant. The Court granted inspection at the

plant. Yet Appellant cites this case as one which upholds its position. (Appellant's Brief 40, 42).

Cudmore v. Bowles (C.A.D.C. 1944), 145 F. (2d) 697, cited by Appellant at page 40 of its Brief is a strong case which sustains our position, not Appellant's. The Court order required respondent to comply with the Subpena or, in the alternative, to permit on-premises inspection. Despite Appellant's assertion (Brief 40) there is nothing in the report which even suggests that the Government sought relief in the alternative.

Appellant is wrong in asserting that the question here presented is one of first impression. The two cases last cited clearly deal with an analogous situation. The argument that "statutory distinction between procedures should be observed" (Brief 41) assumes that the Congress has gone out of its way to reverse the modern trend by unnecessarily multiplying forms of action. One more step backward, and we shall find ourselves involved in the intricate niceties of assumpsit and trespass on the case.

K. PHOTOGRAPHING NOT PREJUDICIAL.

The provision for photographing the records in no sense prejudices Appellant, since photographing is a form of copying and copying is a necessary incident in the inspection of voluminous records.

The discussion of photographing and microfilming appears to have come up because of certain statements in the affidavits that O.P.S. personnel had suggested microfilming as a quick way of getting through with the records, clearly for the purpose of causing Appellant as little trouble as possible (Tr. 8, 24). It is obvious that there were no photographers in the courtroom for no one seemed to have understood what distinction, if any, existed between photographing, photostating, and microfilming. Actually all are photographic processes and it is impossible to find any logical basis for permitting one and not the other. The trial judge, obviously influenced, and properly so, by the analogies found in Rule 34 of the Federal Rules of Procedure permitted "copying or photographing" in the exact words of the Rule (Tr. 36).

Appellant recognizes, at pages 33 and 34 of its Brief, that copying and photographing are the same thing, and is driven by its own logic to argue that both are forbidden to the Government.

Section 705 (a) of the Defense Production Act of 1950 (U.S.C.A. 50 App. 2155 (a)) provides that:

> "The President shall be entitled, . . . by regulation, subpena, or otherwise, to obtain such information from, require such reports, and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony

> of, and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act (said sections) and the regulations or orders issued thereunder . . . "

Does not the wording "necessary or appropriate, in his discretion" apply to the means as well as the matter?

The records in question are quasi-public, required by statute to be kept. It is apparently Appellant's position that the only way the Government can get a copy of such a document is by asking for it. If the request is refused, the Government's agents may look, but they may not copy what they see. They must memorize the contents of voluminous files, must commit to memory long columns of figures.

If this be true, Appellant's conclusion "Thus the statutory scheme is complete" is an understatement. If this be true, the Congress has perpetrated one of the most amazing blunders of all times, and the law is completely futile. It is hard to believe that such argument is seriously intended.

L. THERE WAS NO HARASSMENT OF APPELLANT.

It is more than a little difficult to understand Appellant's argument at pages 41 and 44 of its Brief,

dealing with the supposed harassment of Appellant. The keynote is struck by the extraordinary statement that "It is appropriate that this court assure itself that Appellee has by its actions proved itself worthy of an enforcement order."

If this means anything it means that the United States must produce character references. We find neither statute nor rule defining the procedure for doing so.

The cases cited do not support Appellant's position. *Fleming v. Fossati,* (1947, Ore.), 177 P. (2d) 425, is a state case which invokes the probable cause theory which the Federal courts have refused to follow. *(Hagen v. Porter,* supra). Further, the Court did not refuse inspection, but merely remanded the case for determination of the facts. The Oregon Supreme Court apparently regarded the case as an injunction proceeding, and questioned the necessity for extraordinary relief. Such is not the situation in Federal court.

Appellant makes much of the fact that two agents spent ten days on the records, and got only as far as the base period and one subsequent month, whereas one of the attorneys reviewed the entire base period in two hours. Can it be that there were differences in both objective and thoroughness? O.P.S. investiga-

tors are not necessarily either lawyers or accountants. They have to feel their way in unfamiliar situations, but this does not mean that anyone is being harassed.

The argument concerning the time allowed by the Subpena is not covered by Appellant's Statement of Points (Tr. 102-105) and is not properly before the Court. Appellant's point "L" is directed to the court order and not to the Subpena. In any case the argument on this point is flimsy and without merit.

It is difficult to follow Appellant's reasoning in this whole section of its Brief (pages 41-44). The language of Colman's affidavit (Tr. 12-13) is cited as evidence of harassment. The language is not correctly quoted or summarized. The exact language (Tr. 12) is:

> 'That further check made of invoices for *a month* subsequent to the base period indicated consistent and a continued practice by the subject, West Side Ford Company, of charging in excess of maximum ceiling prices." (Emphasis supplied.)

Affiant does not say *what month.* If he means the month immediately following the base period, grammar demands that he say "*the month* subsequent to the base period" rather than "*a month.*" It is silly to assume, as Appellant suggests, that Colman did a

useless thing when the plain meaning of his language clearly shows the opposite.

Appellee deplores the unnecessary heat of the argument culminating in the sentence:

> "Such unwarranted prejudicial conduct should not be countenanced." (Appellant's Brief, 44).

There is nothing in the case to justify such an outburst.

In any event, as the Court aptly said in *Application of Compton*, (U.S.D.C. N.D. Texas) 101 F. Supp. 547, 549, which was a proceeding to enforce a Subpena Duces Tecum under the present Defense Production Act:

> "Neither inconvenience, expense, nor *harassment* can defeat this right to make the investigation." (Emphasis supplied).

M. NO CONSTITUTIONAL RIGHT OF APPELLANT HAS BEEN VIOLATED.

Convention demands that any Defendant who runs afoul of any recently created administrative agency shall invoke the Fourth and Fifth Amendments to the U. S. Constitution. This case is no exception.

Appellant's constitutional arguments, as summarized in the Table of Contents of its Brief are:

(1) "Both the Administrative Subpoena and the Enforcement Order are so vague that they authorize an unreasonable search and seizure in contravention of the Fourth Amendment." (Brief, Table of Contents, B 2).

(2) "The Enforcement Order . . . denies Appellant the due process of law required by Fifth Amendment . . . by authorizing on-premises inspection of documents after Appellant was required to defend a motion for off-premises production of documents." (Brief, Table of Contents D and D 1).

These contentions will be treated in order.

(1) The Fourth Amendment.

Appellant's argument on this point is based upon a misreading of *Hale v. Henkel*, 201 U.S. 43, 50 L. Ed. 652, decided in 1906. All that the Court held was that Congress had not authorized inspection of the documents there in question. The Court said, at page 77 of the U.S. report, pages 666-7 of L. Ed.:

> "Of course, in view of the power of Congress over interstate commerce, to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by Act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment."

Since the constitutional question was thus clearly settled at least forty-six years ago, we have at most a statutory question. The records in this case are all quasi-public records, required by Section 705 (a) of

the Defense Production Act of 1950 as amended (U.S.C.A. 50 App., Sec. 2155 (a)), and by the Regulations and order already cited and quoted. *Bowles v. Insel*, 148 F. (2d) 91; *Bowles v. Glick Bros.*, 146 F. (2d) 566; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 90 L. Ed. 614; *U. S. v. Kempe* (U.S.D.C. N.D. Iowa) 59 F. Supp. 905.

Records so kept pursuant to statute and regulation are clearly public or quasi-public in character; and the constitutional guarantees protecting private papers have no application to them. *Wilson v. U. S.*, 221 U.S. 361, 55 L. Ed. 771.

(2) The Fifth Amendment.

We have already demonstrated above in Section III., J and K, that the District Court, far from exceeding its powers, failed to exercise them fully, to the advantage of Appellant and the possible disadvantage of Appellee. Appellant is in the position of one who attempts to invoke "due process" and "fair play" because he was charged with murder and convicted of manslaughter.

The judge was kind, considerate, toned down his Order to meet some of Appellant's suggestions. Appellant silently accepted the boon thus granted, now snaps at the hand which granted it.

> "The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights which may be affected, the order, judgment, or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense. An order, judgment, or decree entered in such circumstances does not violate the due process clause even though it be erroneous in fact or law, or both. (Citing authorities) The proceeding involved here was in due form; the court had jurisdiction of the subject matter; and the state and the commissioner had notice and were heard. That satisfied in full measure the exactions of due process."

State of Kansas v. Occidental Life Ins. Co., 95 F. (2d) 935, 937; certiorari denied 305 U.S. 603, 83 L. Ed. 383.

One who claims failure of due process must show first, that the Constitution has been violated, and second, that he has been prejudiced thereby. *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 76 L. Ed. 1038.

Since neither element exists in this case, the argument need not be prolonged.

N. CUMULATIVE EFFECT NOT ERRONEOUS.

Since everything done by the agency was in order, and the trial Court acted within the limits of

its authority, the cumulative effect cannot be erroneous.

If we understand Appellant's argument at pages 45 and 46, it means that although each step taken in an administrative proceeding is legally correct, yet, because Appellant considers himself abused, the whole proceeding should go out of the window. We do not follow. No matter how many zeroes one adds or multiplies together, the result is still zero.

The quotation from Gellhorn at page 45 is eloquent. It may or may not be the law, but by its own terms it requires a showing of "vitiating unfairness" which is completely lacking here.

IV. CONCLUSION

We have read with care every report and other document cited in Appellant's Brief. We find nothing in any of them which, considered in context, supports Appellant's position. Appellee's case could, if necessary, be sustained without citation of any authority beyond those cited by Appellant.

Since everything done by the Office of Price Stabilization was done legally and properly, within the provisions of the applicable statutes and regulations, and since the Order of the District Court grant-

ed the United States a lesser degree of relief than the facts and pleadings warranted, there is no reversible error in this case.

Appellee, therefore, prays that the District Court's Order be affirmed, and that the case be remanded to the District Court for such further proceedings as may be necessary, and particularly for the fixing of a new time for inspection, since, by reason of the appeal, the original time limit has expired.

Respectfully submitted,

J. CHARLES DENNIS
U. S. District Attorney

JOHN H. BINNS,
Special Assistant U. S. District Attorney

1023 U. S. Court House
Seattle 4, Washington